Orthodox Jewish Home for the Aged *and* District 1199 WV/KY/OH, Service Employees International Union, AFL–CIO–CLC. Cases 9–CA–30478 and 9–CA–30770

August 31, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On March 8, 1994, Administrative Law Judge Robert T. Wallace issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Orthodox Jewish Home for the Aged, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(c).

''(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.''

2. Substitute the attached notice for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We correct the judge's inadvertent error of not including the Board's standard language in par. 1(c) of the recommended Order and modify the notice accordingly.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail to bargain in good faith with District 1199 WV/KY/OH, Service Employees International Union, AFL–CIO–CLC, by not promptly complying with requests for information necessary and relevant to performance of its duties as your exclusive bargaining representative and by unilaterally implementing changes in your terms and conditions of employment.

WE WILL NOT fail to reinstate employees who engage in an unfair labor practice strike against us immediately upon receipt of their unconditional offer to return to work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer immediate and unconditional reinstatement to all employees who participated in the unfair labor practice strike against us which commenced on February 22, 1993, and WE WILL make them whole, with interest, for all wages and benefits denied them from and after the date (April 28, 1993) on which we received their unconditional offer to return to work.

WE WILL, on request, bargain in good faith with District 1199 WV/KY/OH, Service Employees International Union, AFL–CIO–CLC as your exclusive bargaining representative concerning terms and conditions of employment; and, if an understanding is reached, embody it in a signed agreement.

ORTHODOX JEWISH HOME FOR THE AGED

Carol Shore, Esq., for the General Counsel.
J. Alan Lips and *Michael Lueder, Esqs. (Taft, Stettinius & Hollister)*, of Cincinnati, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT T. WALLACE, Administrative Law Judge. This case was tried in Cincinnati, Ohio, on September 7–8, 1993.[1] The charge was filed on March 11 and the complaint was issued on April 29.

[1] All dates are in 1993 unless otherwise indicated.

The basic issue is whether Respondent violated Section 8(a)(5) of the National Labor Relations Act by not complying with the Union's request for certain Medicaid data, thereby rendering a unilateral wage increase and failure to reinstate striking employees unlawful under Section 8(a)(1), (3), and (5) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent,[2] I make the following

FINDINGS OF FACT

Respondent, a corporation, operates a nonprofit religiously oriented nursing home in Cincinnati, where it annually receives revenues in excess of $100,000. It admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

The Home has about 108 elderly residents who require regular maintenance and terminal care, and approximately 70 percent are Medicaid recipients. It employs a managerial and clerical staff of 45 individuals in addition to approximately 100 bargaining unit employees represented by the Union.

The Union was first certified as exclusive collective-bargaining representative of the unit in 1971; and since that time it successfully negotiated a series of 3-year contracts the most recent being effective from February 8, 1989, through December 7, 1992.

Negotiations for a new contract began on October 22, 1992, and entailed 10 sessions over a 7-month period ending on June 2. At the second session (December 2), Home Executive Director Leonard Sternberg abandoned the 20-year pattern of 3-year contracts and demanded that any agreement be limited in duration to 1 year, stating he did not want the Home overextended in light of a declining census of residents, overstaffing, and uncertainty as to what changes would be made in Ohio's Medicaid reimbursement formula as a result of an overall revision effective in July. Sternberg never retreated from that demand and the Union vigorously opposed it.

By letter dated December 14, 1992, the Union's lead negotiator (Veronica Davis) requested 6 items of information, including ''two most recent Medicaid cost computation sheets showing the Medicaid rate setting calculation for the Home.'' Responding on December 23, the Home provided information on five of the items but as to the Medicaid sheets it stated:

> We do not believe you are entitled . . . . These calculation sheets are used by the Ohio Department of Human Resources in calculating and auditing reimbursements for Medicaid covered residents . . . . Such income information is irrelevant to these negotiations, since we have not pled poverty or otherwise claimed that the Home cannot economically meet the Union's demands. We have repeatedly told you that the Home is simply ''unwilling'' to offer more than the proposed increase in wages and benefits. If you see any special basis under the law for requiring production of the information, please immediately bring it to our attention so we can reconsider our position.

There was no written response by the Union. However, David Regan, its Regional Director for Ohio who assisted Davis in the negotiations, contends that the Medicaid costing sheets were orally requested at virtually every session; and that at the session on December 28 (the first to be held after the December 23 refusal), and again on December 30, he explained that the sought data would enable the Union to determine how close the Home's historic costs were to the pre-July Medicaid reimbursement ceilings, thereby to assess the likelihood of its being adversely affected by changes in the program and the legitimacy of its claimed need for a short term agreement. As stated by Regan (Tr. 168–169):

> What was said [on December 28] . . . was that we needed that information to be able to evaluate your . . . linking a one-year agreement to this uncertainty in the Medicaid system . . . . I said . . . that that uncertainty is much more relevant if you're near the ceilings under the reimbursement system. If you're not, there's less credence to that claim . . . . Without that information, we had no way to judge how vulnerable the Home was to any possible changes coming in July . . . . [No one] was . . . predicting reductions in the absolute costs of the Medicaid ceilings. That was said . . . [and so] the further you are from them the less vulnerable you are under any changes that come to pass.

Regan also states, without contradiction, that at the session on December 30 Home's representative justified insistence on a 1-year agreement by stating that ''[while] they're not in financial difficulty yet, they're trying to be financially sound, they want to avoid being in dire financial straights.''[3]

Executive Director Sternberg testified that union requests for the Medicaid data at the sessions were sporadic and casual and that its representatives never mentioned ''ceilings'' or otherwise explained why it needed that data.

On February 19 the parties met briefly. The Home proffered a final proposal. The session ended with no concessions on either side. On the next day the Union sought and obtained a strike vote; and the strike began on February 22.

On March 7, the Home unilaterally effected a wage increase pursuant to its final offer; and on March 24 it advised the Union that all striking employees had been permanently replaced. By letter dated April 26, the Union conveyed to the Home an unconditional offer to return to work on behalf of striking employees. Viewing the strike as an economic one, the Home proceeded to rehire striking employees, but only as openings developed.

On May 20, 3 weeks after the complaint issued, the Home made the requested data available to the Union.

The core question presented is whether the Home had a duty to provide the data in furtherance of the collective-bar-

[2] General Counsel's unopposed motion (on p. 14 of his brief) to correct errata in the transcript is granted. Likewise, granted is Respondent's unopposed motion, dated November 3, to rectify a printing error in its brief by accepting amended pp. 25 through 29.

[3] Earlier during the session on December 30 the Union sought wage increases at the beginning of each year of a 3-year contract, while the Home countered with an offer of an increase but only for the duration of a 1-year contract.

gaining process, and this in turn depends on whether it was relevant in the context of a bargaining issue. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). The standard of relevancy, however, is a liberal one akin to discovery. *Dahl Fish Co.*, 279 NLRB 1084 (1986). Further, the information sought need not be dispositive of the issue in dispute but merely have some bearing on it. See *Pfizer, Inc.*, 268 NLRB 916, 918 (1984).

I find sufficient relevance.

Admittedly, contract duration was a key issue throughout the bargaining process. By basing its need for a short-term rather than long-term contract on, among other things, uncertainty as to whether its main source of revenue (i.e., Medicaid reimbursements from the State of Ohio) would be adversely affected by an eminent overall legislative revision, it placed the likelihood of that result in issue for the reasons expressed by Union Representative Regan. And, unlike the situation in *Neilsen Lithography Co.*, 305 NLRB 697 (l991), the request here was not for wholesale financial information. Rather, it was discrete in scope, asking for a specific document—one directly related to the issue in question.

As to whether those reasons were contemporaneously given, I have credited his affirmative claim finding it improbable that he simply reiterated the Union's request for the Medicaid data at a bargaining session without giving (or being asked for) reasons. See *Emery Industries*, 268 NLRB 824, 825 (1984); *Beverly Enterprises*, 310 NLRB 222, 227 (1993).

I find no merit in the Home's alternative claim that it was under no obligation to provide the requested Medicaid data because it could have been secured from public records in the office of the Ohio Department of Health in Columbus, Ohio. Even if true, there is no indication that it contemporaneously advised the Union of that circumstance. Moreover, its duty to provide relevant data in its possession is not excused by the fact that it may be obtained elsewhere. *Kroger Co.*, 226 NLRB 512, 513–514 (1976).

Further, the fact that the Home eventually (on May 20, after the complaint issued) made the Medicaid data available lacks significance in the circumstances of this case. See *Dahl Fish Co.*, 279 NLRB 1084, 1103 (1986). The Union was entitled to the information in a timely fashion in order to perform its function as a bargaining agent in an intelligent fashion. *Quality Engineered Products*, 267 NLRB 593, 598 (1983); *K & K Transportation Corp.*, 254 NLRB 722, 736 (1981).

I conclude that by failing to respond to the Union's data request in a timely manner the Home frustrated the collective-bargaining process in violation of Section 8(a)(1) and (5) of the Act.

This in turn renders unlawful Home's unilateral implementation of its final wage proposal on March 4. The Board has held that an employer's wrongful failure to supply relevant data for negotiations constitutes a failure to bargain in good faith and precludes the parties from reaching a genuine impasse. See *Pertec Computer*, 284 NLRB 810, 812 (1987). *Dahl Fish Co.*, supra; *Coalite, Inc.*, 278 NLRB 293, 300–301 (1986); *Harvstone Mfg. Corp.*, 272 NLRB 939, enfd. as modified 785 F.2d 570 (7th Cir. 1986). Accordingly, the Home was not privileged to implement its final offer, and its action in doing so also violates Section 8(a)(1) and (5).

A remaining question is whether the Home had an obligation promptly to recall and reinstate striking employees pursuant to their April 26 unconditional offer to return. And this depends on whether the strike, at least in part, was caused by the unfair labor practice. *Lifetime Door Co.*, 179 NLRB 518, 523 (1969); *Citizens National Bank of Wilmar*, 245 NLRB 389, 391 (1979). I find this clearly was the case from its inception. The information request was resolutely pressed by the Union and it related directly to one of the main issues (contract duration) in the negotiations (cf. *C-Line Express*, 292 NLRB 638 (1989)); and I find probable and credit Regan's claim that on the morning of February 22, just prior to their strike vote, assembled union members were told that denial of the information request would be pursued through an unfair labor practice charge. I attribute no special significance to the circumstance that the Union's effort to generate public sympathy and support during the strike did not include publicizing Home's failure in that regard but instead focused exclusively on easily understood ''bread and butter'' issues. See *Lifetime Door Co.*, supra. I conclude that Home's failure immediately to reinstate striking employees on receipt of their unconditional offer to return was discriminatory in violation of Section 8(a)(1) and (3).

CONCLUSION OF LAW

The Respondent, Home, violated the Act in the particulars and for the reasons stated above; and its violations have affected, and unless permanently enjoined will continue to affect, commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

In addition to the customary cease-and-desist order and requirement for notice posting, my order will require Respondent to immediately and unconditionally reinstate all employees who participated in the unfair labor practice strike which commenced on February 22, 1993, and make them whole for all wages and benefits denied them from and after April 28, 1993, the likely date of receipt of their unconditional offer to return, with backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987); and to recognize and, on request, bargain with District 1199 WV/KY/OH, Service Employees International Union, AFL–CIO–CLC as the exclusive representative of employees in regard to terms and conditions of employment and, if understanding is reached, embody the understanding in a signed agreement.

Disposition

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Orthodox Jewish Home for the Aged, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to bargain in good faith with District 1199 WV/KY/OH, Service Employees International Union, AFL–CIO–CLC by not promptly complying with requests for information necessary and relevant to performance of its duties as the exclusive collective-bargaining representative employees in a unit composed of:

> All full time and regular part-time service and maintenance employees employed at Respondent's location situated at Towne Avenue and Paddock Road, Cincinnati, Ohio, including waitresses, porters, orderlies, nurses aides, dishwashers, maids, cooks, cooks' assistants, salad girls, laundry workers, and licensed practical nurses; but excluding all office clerical employees, professional employees, guards and supervisors as defined by the Act, all administrative employees, registered nurses, private duty nurses, registered technicians, beauty operators and barbers, temporary employees as defined in the collective bargaining agreement, and all others not specifically included,

and by unilaterally implementing changes in terms and conditions of employment.

(b) Failing immediately to reinstate employees engaged in an unfair labor practice strike upon receipt of their unconditional offer to return to work.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer immediate and unconditional reinstatement to all employees who participated in the unfair labor practice strike which commenced on February 22, 1993, and make them whole for all wages and benefits denied them from and after April 28, 1993, in the manner set forth in the remedy section of this decision.

(b) On request, bargain in good faith with District 1199 WV/KY/OH, Service Employees International Union, AFL–CIO–CLC as the exclusive representative of employees in the unit described above concerning terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Cincinnati, Ohio, copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''